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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~207~~ 55

UNITED STATES OF AMERICA,

Appellant,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, CHRISTIANA SECURITIES COMPANY and DELAWARE REALTY AND INVESTMENT CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AFFIRM.

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DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 781.

UNITED STATES OF AMERICA,

Appellant,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, CHRISTIANA SECURITIES COMPANY AND DELAWARE REALTY AND INVESTMENT CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

Motion to Affirm.

Pursuant to Rule 16, appellees Christiana Securities Company (Christiana) and Delaware Realty and Investment Company (Delaware) move that the judgment of the District Court be affirmed on the grounds set forth in the similar Motion of appellee, E. I. du Pont de Nemours and Company (du Pont), and on the additional grounds set forth herein.

The first additional ground is that, since no violation of Section 7 of the Clayton Act was alleged, proved or found against Christiana or Delaware, the District Court could not properly have granted against them the relief requested by appellant, or any other or further relief beyond that contained in the judgment to which they expressly consented. To have granted such other relief under the circumstances would not only have been inequi-

table but also would have raised constitutional questions of due process, as was pointed out to, and recognized by, the District Court (Op., 14, 89).

The second additional ground is that the judgment is tentative in nature and does not merit full review at this time.

Discussion.

I.

Any further relief against Christiana and Delaware would not be founded on any cause of action against them.

The previous appeal.

In remanding this case to the District Court this Court said as to Christiana and Delaware (353 U. S., p. 608): "'It seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted.''

But this Court made no finding, and the District Court had made no finding, of a violation of Section 7 of the Clayton Act by Christiana or Delaware. There could have been no such finding, for there was no allegation in the amended complaint of a violation by them of Section 7 or even an allegation that they were engaged in commerce, an express condition in Section 7 to the applicability of the Section to a corporation.*

In retaining Christiana and Delaware as parties to the relief proceeding in the District Court, this Court did not

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* This Court has held that intrastate activities are not engaging in interstate commerce within the meaning of identical language in a similar statute, even though the activities might affect interstate commerce, *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941).

decide the question whether substantive relief could properly be granted against them. On the previous appeal appellant abandoned its original question raising this point and expressly requested that the question not be decided by this Court on that appeal, saying, "The Government does not believe that now is the time to consider that question" (Reply Brief for U. S., p. 36). Appellant further stated that it would seek relief against Christiana and Delaware only in the event of distribution of General Motors stock to du Pont stockholders, but did not take a position on the appeal as to whether such a distribution would be appropriate. Consequently, the question of propriety of substantive relief against Christiana and Delaware was a hypothetical or abstract one and was not decided by this Court.

The position of Christiana and Delaware in the relief hearing.

In the relief hearing Christiana and Delaware took the position that substantive relief could not properly be granted against them, when no cause of action under Section 7 had been established or even alleged against them. Fundamental procedural principles were adverted to and also basic constitutional questions relating to the due process clause. *Windsor* v. *McVeigh*, 93 U. S. 274, 282 (1876); *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281-282 (1912). As would be expected, these basic doctrines apply in antitrust cases. *United States* v. *National Lead Co.*, 332 U. S. 319, 351-352 (1947); *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 403 (1945).

While maintaining this position, Christiana and Delaware informed the District Court that they would cooperate in an effort to obtain a judgment effectively carrying out the mandate of this Court, provided it was not destructive

of real values. As an example, they pointed to their consent to the proposal of du Pont that, when the vote on its General Motors shares should be passed through to du Pont stockholders, Christiana and Delaware would in turn pass through the votes received by them to their stockholders.

However, this was far different from the punitive relief requested by the Government against them, namely, that the shares of General Motors stock to be received by them from du Pont under the Government proposal be sold by them in the market for what they would bring.* This would have entailed capital gains taxes of from over $135 million to over $200 million, depending on whether the price received was $32.20 per share of General Motors stock or $46 per share (Op. 33), and market and cost of sales losses of from $116 million to $292 million, depending on whether the price realized was 10% or 30% below the then market price of $46.** (Christiana Exhibit 8.) Even Government witnesses conceded that the sales would probably reduce the market price by at least 10%.

Christiana and Delaware have more than 4,000 stockholders, including many charitable and educational institutions, against whom there is not, and could not be, any finding of a violation of law (Op. 16, 33).

Faced with these equitable and constitutional considerations in respect of Christiana and Delaware and their stockholders, it would seem that the District Court could not have done otherwise than reject the harsh penalties on them

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* The Government proposed that the 535,000 shares of General Motors directly held by Christiana be included in the sales, although there was no allegation in the amended complaint regarding such shares, and also shares to be distributed by du Pont to those of its stockholders who happened to be stockholders of Delaware, although such persons were not even parties.

** The present market price of General Motors is about $45 per share.

proposed by the Government. Although not persuaded, as the Government contended, that Christiana and Delaware and individuals in their managements, and their families, could or would through voting power in General Motors influence General Motors in favor of du Pont, nevertheless the District Court took away their vote, to which Christiana and Delaware subsequently consented in open court. Following entry of the judgment, individuals in the managements and members of their families have filed written consents in the District Court to be bound by the voting provisions of the judgment. The District Court has appointed a Monitor to supervise compliance with these provisions. Under these circumstances it is difficult to see how a more effective decree could have been entered.*

These dispositions of the District Court would certainly seem to be reasonable and effective and not to raise any substantial question warranting full briefs and argument. This is doubly so since any attempt to go further and grant the sort of relief requested by the Government against Christiana and Delaware, against whom no cause of action has been established, would raise serious constitutional questions.

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* As the District Court stated, under the judgment "there would be left with the entire group as to which the Government has raised questions" less votes than would be left with them under the Government plan (Op. 88-89).

II.

The judgment, being tentative in nature, does not now merit full review.

As an additional consideration on the question whether the judgment warrants further review on full briefs and argument, we should like to emphasize the tentative nature of the judgment due to provisions (Art. IX) adverted to in the Motion of du Pont. It is there provided that, if the provisions of the judgment should prove inadequate to remedy the violation of the Clayton Act or, if bills for tax relief* on distributions forced under the antitrust laws are passed, the Attorney General or any other party may apply at any time for modification of the judgment in the light of the circumstances then existing.

This provision is not a standard retention of jurisdiction provision, which the judgment also contains (Art. XII), providing in substance for further orders in *execution* of the judgment. The provisions of Article IX obviously look to *different* relief from that now provided in the judgment. For example, in case a tax bill should be enacted, substantially ameliorating the taxes on a distribution of General Motors shares by du Pont, an order for such a distribution is clearly contemplated. Similarly in the same sentence, it is provided that if the judgment should prove inadequate to remedy the violation of the Clayton Act, other relief may be applied for, obviously also different from that now set forth in the judgment.

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* These bills are similar to the acts which have been passed to give tax relief in the case of distributions forced under the Bank Holding Company Act and the Public Utility Holding Company Act. Like those Acts, Section 7 of the Clayton Act is remedial, and not a penal statute (Op. 26). Representatives of the Department of Justice testified before the Committees of Congress in favor of such a bill.

The ultimate issue before the District Court was whether anything short of full divestiture (and sale of the stock applicable to Christiana and Delaware) would constitute a continuing threat of the anticompetitive effects referred to in Section 7 of the Clayton Act. This question had to be decided in the context of a record in which those anticompetitive effects had not in fact resulted, even under full ownership with substantial board representation and unencumbered voting rights.

Article IX is obviously a recognition by the Court that there is presently no conclusive basis upon which to make this judicial prediction. In that sense the judgment is tentative. It recognizes that a change in the tax laws (a change which is not purely speculative because bills are pending before Congress) might well eliminate the inequities that would follow from a distribution under the present tax laws. It also recognizes that even if there is no change in the tax laws, the actual passage of time might well eliminate the purely speculative nature of a present determination that mere retention of the stock certificate might lead to anticompetitive effects. This present disposition of the problem, we suggest, is not only beyond the charge of abuse of discretion but is eminently reasonable.

While we are not contending that the judgment is not "final" so as to deprive this Court of its jurisdiction to review, we do believe that many of the considerations that underlie the rule of finality are present in this case.* It is unsound to ask the Court at this time to speculate as to eventualities that might render this judgment inadequate

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*Cf. *City of Paducah* v. *East Tennessee Telephone Co.*, 229 U. S. 476, 480 (1913). See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949); *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558 (1929); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142 (1944); *Zimmern* v. *United States*, 298 U. S. 167, 169 (1936).

when at a later time the Government has the opportunity to show that these eventualities have occurred, or at least that their likelihood is more real than has been made to appear on this record.

Thus an affirmance of this judgment does not foreclose further or different relief in the event the present speculations of the Government prove to have any substance, or in the event changes occur which would permit the relief the Government urges without subjecting innocent persons to unwarranted penalties. Cf. *St. Louis, Iron Mountain & Southern R. R.* v. *Southern Express Co.*, 108 U. S. 24, 28-29 (1883).

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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